

2. If so, did claimant provide respondent with timely notice of the accident or injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and the parties' arguments, the Board finds and concludes that the Preliminary Decision should be affirmed.

Several days before claimant began his job with respondent in May 2000, claimant underwent both a medical evaluation and a skills/agility evaluation to determine whether he could safely work for respondent as a warehouse worker. Although claimant occasionally experienced low back symptoms, which he attributed to a 1999 injury that was diagnosed as a pulled muscle, claimant's medical and skills/agility evaluations indicated that he could safely perform the job duties of a warehouse worker, which included occasionally lifting and carrying 70 pounds.

In January 2001, claimant sought medical treatment for his back from his personal physician and a January 24, 2001 MRI indicated that claimant had moderately severe left lateral spinal stenosis at L4-5 due to a left lateral disc herniation with left L5 neural compression and a smaller left lateral disc herniation at L5-S1 with left S1 neural compression.

Between May 2000, when claimant passed the physical evaluation, and January 24, 2001, when the MRI confirmed the herniated discs in claimant's back, claimant worked for respondent pulling orders in its warehouse and later as a saw operator.

Claimant's credibility is crucial to this claim. Claimant testified he injured his back at work in late December 2000 lifting a heavy aluminum plate. But respondent and its insurance carrier contend they are not responsible for claimant's back injuries as the injuries stem from either the 1999 injury or an early November 2000 incident when claimant and another man carried a couch upstairs into claimant's apartment.

Judge Foerschler found claimant's testimony credible and awarded preliminary hearing benefits. At this juncture of the claim, the Board also finds claimant's testimony credible. Therefore, the Board finds it is more probably true than not that claimant injured his back in late December 2000 while lifting a heavy plate of aluminum. The Board concludes that the accident arose out of and in the course of employment with respondent.

The Board further concludes that claimant provided respondent with notice of the back injury the day after it occurred. Accordingly, the notice was timely.¹ Claimant testified that the morning after the lifting incident he awoke with intense pain in his low back. Despite the intense pain, claimant went to work that morning and advised his immediate

¹ See K.S.A. 44-520.

supervisor, Brad Jarman, about having back pain from lifting at work the day before. Brad Jarman testified that sometime in December claimant told him about hurting his back at work. But Mr. Jarman did not believe claimant as claimant had previously told him about having back symptoms following the 1999 and November 2000 incidents.

At this juncture of the claim, the Board concludes that claimant has satisfied his burden of proof and has established his right to receive preliminary hearing benefits.

WHEREFORE, the Board affirms the October 16, 2001 Preliminary Decision entered by Judge Foerschler.

IT IS SO ORDERED.

Dated this ____ day of December 2001.

BOARD MEMBER

c: W. Greg Wright, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Workers Compensation Director